BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PATRICIA HAMEL	)	
Claimant	)	
VS.	)	
	)	Docket No. 219,836
ROADWAY EXPRESS, INC.	)	
Respondent	)	
AND	)	
	)	
ROADWAY EXPRESS, INC. &	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

This case is before the Appeals Board on remand from the Kansas Court of Appeals.

APPEARANCES

Davy C. Walker of Kansas City, Kansas, appeared on behalf of claimant. Wade A. Dorothy of Lenexa, Kansas, appeared on behalf of respondent and its insurance carriers.

ISSUES

On October 19, 1998, the Appeals Board entered an Order in this case affirming the decision of the Administrative Law Judge. The Administrative Law Judge had found claimant has a 45.5 percent work disability based on a 29 percent task loss and a 62 percent wage loss. Claimant appealed and the Court of Appeals remanded the case with directions for the Board to clarify and explain the reasons for its findings on task loss.

DECISION ON REMAND

The record in this case includes task loss opinions from two physicians, Dr. Ernest H. Neighbor and Dr. Lowery Jones, Jr. Both physicians rely on a task list prepared by Mr. Michael J. Dreiling. In its original decision in this case, the Board relied on the task loss opinion of Dr. Jones. Dr. Jones opined that claimant cannot do two of seven, or 29 percent, of the tasks. The two tasks he believes claimant cannot do are: (1) loading and unloading trailers and (2) operating a high loader. The list prepared by Mr. Dreiling also showed a time weighting for the tasks. The loading and unloading represents 70 percent of the work claimant performed as a dock worker and operating the high loader represents 20 percent

of that same job. Claimant worked as a dock worker for 118 months or 66 percent of the relevant 15 years. Using Mr. Dreiling's calculations, these two tasks represent, on a time-weighted basis, 59 percent of the tasks.[1] The Board, however, used the 29 percent to calculate work disability. Claimant's 62 percent wage loss was averaged, as required under K.S.A. 44-510e, with the 29 percent task loss to arrive at a 45.5 percent work disability.

In its decision, the Court of Appeals first noted that the sole issue on appeal was whether there was substantial competent evidence to support the Board's findings. The Court then analyzed the evidence relating to the task loss as follows:

> The Board did not provide its rationale for rejecting Jones' time-weighted calculation of Hamel's task loss. As to Jones' assessments of Hamel's task loss, the Board was presented with two alternatives: the 29 percent task loss or the 72 percent task loss. This was a disjunctive syllogism:
>
> > There was either a 29 percent task loss or a 72 percent task loss.
> >
> > The finding was that the task loss was 29 percent.
> >
> > Therefore, there was not a 72 percent task loss.
>
> A true disjunctive expresses a choice, or an alternative, between two things which cannot both be true. Here, because both alternatives can be true, depending on the method of calculation utilized, the alternatives are not mutually exclusive. As a result, the Board's selection of the 29 percent task loss did not automatically imply the 72 percent was any less correct.

The Court of Appeals also questioned as follows the reasoning for the decision to use Dr. Jones' opinion rather than the opinion of Dr. Neighbor:

> In addition, it is questionable whether the Board adequately explained its reason for rejecting Dr. Neighbor's opinion regarding the percentage of Hamel's task loss. A true disjunctive requires that alternative terms not only be mutually exclusive, but also be collectively exhaustive. The alternative terms cannot permit a possible third alternative. Here, Dr. Neighbor's opinion was a third alternative.

In light of these above-quoted considerations, the Court of Appeals concluded there was not substantial competent evidence to support the Board's decision. The Court remanded the case with direction for the Board to clarify its decision. As we understand the Court's direction, the Board is to explain: (1) why it chose the 29 percent as opposed to the time-weighted higher percentage; and (2) perhaps also why the Board used Dr. Jones'

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[1] The Court of Appeals did a more general calculation. The Court noted claimant worked as a dock worker for approximately 12 of the 15 years. This would be 80 percent of the 15 years. Since the two eliminated tasks represented 90 percent of the dock worker job, the Court time weighted these two tasks as 72 percent of the total tasks.

opinion rather than Dr. Neighbor's. It is further our understanding that the Court of Appeals does not consider either method of calculation to be required as a matter of law. The Court would otherwise have ruled on that legal issue.

The Board chose the 29 percent opinion of Dr. Jones, rather than the time-weighted opinion, because the Board concluded the time-weighted opinion unfairly inflated the loss. In this case, the time weighting has the effect of emphasizing the loading and unloading work, described as one task, because claimant performed this task for 70 percent of the time. In some cases the Board might agree that such emphasis is appropriate. But here the evidence also tended to show that claimant would have remained able to perform an unidentified part of the loading and unloading work and appears Dr. Jones relied on a description of the tasks, namely that it was all repetitive, that is not otherwise supported in the record.

When Dr. Jones was asked whether, in his opinion, claimant could still do the loading and unloading work, he first asked for clarification. Dr. Jones had restricted against overhead work on a repetitive basis and suggested that most of her work should be at the waist level or below. He also stated claimant could lift 30 to 40 pounds occasionally but should be limited to light repetitive work such as sedentary activities to include lifting 20 pounds or less. In accordance with these restrictions, Dr. Jones asked how much of the loading and unloading activities involved over 20 pounds, how much was waist-to-chest, and how much was from 20 to 30 pounds. Claimant's counsel was only able to provide part of the clarification requested. He advised, based on claimant's testimony, that 90 percent of the work involved weights over 20 pounds but did not know how much was 20 to 30 pounds. He advised the work involved lifting anywhere from floor-to-ceiling but did not know how much was at waist level. But in addition, claimant's counsel advised that all of the work required repetitive bending and stooping. With that statement, Dr. Jones then answered:

> Okay, thank you, for the clarification. I would say that of all of the activities, being unable to separate the specific question that I gave you, that her loading at Roadway, that all of the loading activity that she did she would be unable to continue to do on a repetitive basis.

But the record does not substantiate the statement that the bending and stooping was repetitive, as that term of art is used, and the term is not defined. Mr. Dreiling's description of the task describes the bending and stooping as frequent and defines frequent as one-third to two-thirds of the time. Because this task represents such a large portion of the work claimant has done and because it appears claimant could do an unmeasurable portion but not all of this task, the Board considers it inappropriate to give it the emphasis which results from time weighting.

In answer to the second concern raised by the Court of Appeals, the Board chose to rely on the opinion of Dr. Jones rather than on Dr. Neighbor's, because we considered it to be more likely unbiased and further considered it to be consistent with the overall evidence

of the extent of claimant's injury. Dr. Jones was appointed by the Court to perform an independent evaluation. Dr. Neighbor was retained by claimant's counsel. The Board was not persuaded by Dr. Neighbor's testimony or other evidence in the record that claimant cannot perform the other three tasks claimant contends Dr. Neighbor eliminates. In fact, for two of those additional tasks, construction clean-up work and food service personnel supervision, Dr. Neighbor only states it would be difficult for claimant. As to bartender work, he stated she could not do these activities on a repetitive basis. For these reasons, the Board finds more persuasive the opinion that claimant can do five of the seven tasks listed.

Based on these reasons, in addition to the findings made in the Board's original Order, the Board has concluded claimant has a 45.5 percent work disability and reinstates its original Order of October 19, 1998.

IT IS SO ORDERED.

Dated this _____ day of January 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Davy C. Walker, Kansas City, KS
Wade A. Dorothy, Lenexa, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director